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C O N F I D E N T I A L SECTION 01 OF 07 BAGHDAD 003107

SIPDIS

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TAGS: [PREL](#) [PGOV](#) [KDEM](#) [IZ](#)

SUBJECT: PART I OF II: AN ARTICLE-BY-ARTICLE ANALYSIS OF  
THE SHIA-PROPOSAL FOR A CONSTITUTION

REF: A. BAGHDAD 3104

[B](#). BAGHDAD 2981

[C](#). BAGHDAD 3055

Classified By: Political Counselor Robert Ford.

Reasons 1.4 (B) and (D).

[1](#). (C) SUMMARY: This cable offers a detailed analytic review of the draft constitution text under discussion in the Constitution Committee as of July 27. (Reftel offers a quick overview of the contents of this draft text.) The document is unmistakably a very rough draft. Although ostensibly an integrated document pulling together work from six sub-committees, the draft is more a Shia opening position than a consensus text. Deputy President Abdel Mehdi told the Ambassador July 25 that it came in response to Kurdish demands (reported in ref b). The negotiating is underway as this cable goes out on July 27. We are engaged with committee members daily and pushing for stronger guarantees on personal freedoms and a unifying vision on federalism. Most importantly, we are pushing for full participation in the drafting process, particularly following the formal end on July 25 of the brief Sunni Arab boycott of constitution committee deliberations. Even our Shia contacts, much less the Kurds and Sunni Arabs, expect the Shia-proposed draft to evolve dramatically in the days ahead. This detailed analysis is interesting because it shows what the Shia maximalist demands are and what kind of vision they see for the state, especially on issues such as balancing individual freedoms and Islam, the broad extent of regional government authorities. END SUMMARY:

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The Context of the Document  
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[2](#). (C) Constitution Committee Chairman Humam al-Hamudi has passed to us and distributed to committee members as of July 24 a draft constitution that integrates the work done by each sub-committee. The distribution and discussion of this document represents the start of the second phase of the committee's deliberations, which up until now have taken place only in sub-committees. Although the document purports to take all of the work done to date and simply merge it into one document, Hamudi and Shia Islamists have clearly put their own gloss on the text, backtracking on previous compromises and introducing a host of Islamic provisions that were not agreed on at the sub-committee level. The document is unmistakably a very rough draft. It is filled with imprecise and ambiguous language, parenthetical points, alternative options, gaps, recorded objections, and is at times self-contradictory.

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A CLOSER ANALYSIS:  
Part I, Founding Principles  
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[3](#). (C) The opening articles of the constitution offer succinct language on several key issues and feature aggressive efforts by Islamists to put a religious stamp on the state.

-- NAMING THE REPUBLIC: Article 1 reads, "The Iraqi (Islamic Federal) Republic is a sovereign independent state. The system of government is republican, democratic, unionist (federal)."

-- ANALYSIS: The parenthetical inserts indicate a bold effort by Islamists to have Iraq named an "Islamic" Republic, a phrase in use in Iran. The text also reveals ongoing sensitivity over the word "federalism" with efforts in the Arabic to use the synonym "unionist." We doubt this will stick.

-- ESTABLISHING AN OFFICIAL RELIGION: Article 2 reads, "Islam is the official religion of the state and the basic (in Arabic "asasi;" it can also be translated as principal) source of law. No law may be passed that contradicts its principles and rulings

(its agreed principles) and this constitution preserves the Islamic identity of the majority of the Iraqi people (in its Shia and Sunni majority) and respects all the rights of the other religions."

-- ANALYSIS: Constitution Chairman Humam al-Hamudi has assured us on multiple occasions that he supports naming Islam only "a source among sources of law," and this language contradicts those assurances. It is most likely a retraction made in preparation for the tough negotiations ahead. If passed, however, this language would represent a dramatic departure from the limiting language on Islam proffered under the TAL, and would appear to subordinate all future laws, if not all provisions of the constitution, to Islam. This would weaken the authority of the entire document. TAL Article 7 (A) and previous drafts referred to Islam as "a source of law" and here it has become "the principal" source. TAL Article 7 (A) forbade the passage of laws "that contradict the universally agreed tenets of Islam, the principles of democracy or the rights cited in Chapter Two." That language put Islam on a parallel level with democratic principles and constitutional rights. The new text appears to drop those benchmarks and allows Islamic law to trump other sources of rights. Article 10 may mitigate these concerns or merely create a contradiction and tension in the whole text. It reads, "Freedoms and basic rights found in the constitution are guaranteed for all and no law may be passed that that curtails them."

-- DEFINING THE NATION: Article 4 reads, "The Iraqi people are made up of two principal nationalities and they are Arab and Kurdish, and of essential nationalities and they are Turkmen, Chaldean, Assyrian, Syriac, Armenian, and Shabak (and Persian) and Yezidi and Sabean Mandeans, all of which have equal rights and duties in citizenship."

-- ANALYSIS: This article goes farther than the TAL ever did to meet minority demands that their presence be recognized by name. In the process, however, the drafters show signs of creating new problems even as they solve an old one. The parenthetical reference to Iraq's "Persian" community is already raising alarm for Sunni Arab delegates who see it as an effort to legitimize Iranian influence in Iraq.

-- IRAQ AND ARABISM: Article 5 reads, "The Iraqi state is part of the Arab and Islamic worlds (or The Iraqi state is a founding member of the Arab League and Islamic Conference Organization)."

-- ANALYSIS: This text makes an effort to address the issue of Iraq's Arab identity through two potential compromise formulas. It may yet raise concerns among Kurds and others worried about legitimizing Ba'athist pan-Arab ideology.

-- AFFIRMING IRAQ'S UNITY: Article 8 reads, "The state of Iraq is unified in land, people and sovereignty."

-- ANALYSIS: This article will address the fears of Sunni Arabs who fear partition, but it stops short of declaring the country "indivisible."

-- A FAMILY VALUES PROVISION: The language for Article 9 is presented parenthetically and appears open to negotiation or elimination. It reads, "The family is the foundation of society. The state preserves the original Iraqi character of the family, which is based on religious principles and values, and morality and patriotism. It guarantees the protection of motherhood and childhood and oversees youth and provides the proper circumstances for the development of their aptitudes and abilities."

-- BROAD EFFORT TO MARGINALIZE THE BA'ATH: Article 11 reads, "There is a ban on the ideology and practice of thought, under any name, that adopts (or that strives for or praises or paves the way for or promotes) racism, terrorism and the charge of apostasy, especially the Saddamist Ba'ath." Later sections carry on the policy pronounced in this section. In addition, Section 3, Article 4 includes the TAL's prohibition against the candidacies for the National Assembly of individuals who fall subject to the de-Ba'athification law. Finally, Section 6, Article 3 makes clear that the Supreme National De-Ba'athification Commission shall continue its work until the "conclusion of its mission" or until it is ended by a 2/3 vote of the National Assembly. This would constitutionalize a process heretofore only addressed in CPA orders, Governing Council and National Assembly decrees, and short section of the

TAL.

-- ANALYSIS: Here too we find language that may solve one problem while creating another. By banning specifically the "Saddamist Ba'ath," this text offers a nod to those Ba'athists who claim that de-Ba'athification has been pursued too broadly because the party was distorted under the former regime. Saddamists are the criminals, not simply Ba'athists, they say, and this text seconds that. However, by broadly banning racism under any name, the provision opens the door to legislation against political parties already on the scene, several of which mirror the chauvinistic pan-Arab, socialist approach of the Ba'ath. Poloff previously asked Constitution Committee Chairman Hamudi if he saw this provision as banning any parties he has heard of recently, and he would not rule out the idea.

-- COMMITTING IRAQ TO THE INTERNATIONAL COMMUNITY: Article 12 reads, "Iraqi internal and foreign relations are based on peace and cooperation with all, particularly with neighboring countries." Article 13, further breaking with the past, reads, "The state of Iraq is committed to international treaties that do not contradict the rulings of this constitution."

-- REGULATING THE MILITARY: Article 14 reads, "The Iraqi Armed Forces, including all services and security organizations, are part of the Iraqi people and represent them in its national, religious, and sectarian composition. It is under the leadership of civil authority and its mission is the defense of the state of Iraq and it cannot intervene in political affairs and has no role in the transfer of power. It is forbidden to use it to oppress the Iraqi people."

-- ANALYSIS: This language does an important job of addressing concerns about a sectarian and oppressive military. Other provisions continue this effort by banning active soldiers and intelligence officials from political office and by stipulating that all handovers of power be made peacefully.

-- ENSHRINING THE MARJA'IIYA: Article 15 reads, "The religious authority (marja'ia) has independence and sacred place of guidance as an exalted, patriotic and religious symbol."

-- ANALYSIS: Rumors of this provision have already prompted surprise and amazement from Sunni participants in the constitution drafting process. This text, more so than any other section of the document, attempts to put a Shia stamp on the constitution without offering any parallel language for religious figures of other faiths. The writers of the draft appear well aware of this, for accompanying this section is a note, "Some have reservations (about this article)."

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Part II: Fundamental Rights  
and Public Freedoms  
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14. (C) The first several articles in this section lay out strong provisions for equal rights, basic freedoms, and equal opportunity, but a series of Islamic conditions on more specific rights and the broad provisions made in Part I throw these early guarantees into question.

-- BASIC FREEDOMS: The first three articles provide for equality before the law and ban discrimination on any basis, including gender. They guarantee the right to privacy, and provide for equal opportunity. However, Article 14, which discusses privacy in the context of the home and freedom of communication, makes the former subject to exceptions "in accordance with the law," and the latter subject to "legal and security necessity."

-- DUAL CITIZENSHIP: Further provisions in Article 4 allow Iraqis who had their citizenship revoked to reclaim it; this is important to Shia and Kurds. The same article provides for dual citizenship, which Sunni Arab delegates have complained will open the door to excessive influence from the sizeable Iraqi community in Iran. To address this concern, the constitution in subsequent sections limits elected office to those who are children of two Iraqi parents. Hamudi has also mentioned the idea of limiting elected office to those who renounce all but their Iraqi citizenship.

-- SAFEGUARDING THREATENED RIGHTS: Further provisions

in articles 7-9 put limits on limits on child labor and ban torture and illegal search and seizure. The provisions ban the state from exiling its citizens illegally; a practice of the former regime, and ban state-imposed limits on movement, assuming such movement does not violate "public order and morals."

-- ONE SAFEGUARD AGAINST ISLAMIC LAW DROPPED: The text does not include past provisions that forbade the state to prosecute crimes or impose punishments not recorded in the law. The text notes a general debate on the subject but offers no language on the issue. Such a provision would prevent the state from using religious sources as a free-form legal guidance, delineating and prosecuting crimes in accordance with interpretation or provisions. However, the Iraqi criminal code already includes such a prohibition.

-- LIBERAL PROVISION ON PERSONAL STATUS DROPPED: The current draft text lacks a personal status provision that Sub-Committee Secretary Kameran Saeed touted on July 25 to Poloff as one of the strongest liberal provisions. That provision had made it clear that religious obligations are voluntary commitments and allowed all citizens the right to choose the personal status law they saw appropriate to their identity, be it Christian, Sunni, Shia, or secular. The provision, now omitted, read, "The followers of every religion or sect are free in their commitment in personal status according to their religious and sectarian beliefs, and (they are free) in the practice of their religious rites in their places of worship and holy sites. All of this will be done in the limits deemed permissible to them and in accordance with the constitution and the law. It is not permissible for any faith or sectarian action to be used as a cover for civil strife or inciting problems in the society." It is likely that supporters of such a provision will try again to have it inserted.

-- MANDATORY NATIONAL SERVICE DROPPED: The integrated draft text drops a clause in the final sub-committee proposal that reads, "Every Iraqi must defend the nation and preserve its unity unless his service is regulated by law and equivalent to volunteer work."

-- CLEAR ISLAMIC RESTRICTIONS ON WOMEN'S RIGHTS: Article 6 reads, "The state guarantees women's basic rights and her equality with men in all areas in accordance with the rulings of Islamic Sharia, and (the state) assists her in reconciling her duties toward the family and her work in the society." As reported ref c, this language offers room for abuse and limitation of women's rights, and introduces a tension with the unlimited guarantees offered in the first articles. It adds an Islamic restriction that the sub-committee charged with drafting this section had never recommended. The Sub-Committee Secretary, Yezidi leader Kameran Khairi Saeed, has passed to Poloff a "final" copy of his committee's work that has no Islamic reference, offering simply, "The state guarantees women's basic rights and her equality with men in all areas in accordance with the law." The added language on state "assistance" in reconciling a women's work and family obligations also appears to open the door to government intervention in personal life despite other guarantees of privacy.

-- FREEDOM OF EXPRESSION AND RELIGION GUARANTEED BUT BOUNDED BY "MORALS": Articles 11 and 12 guarantee freedom of expression and religion while placing an identical "morals" limitation on both. The wording of the provisions at times implies that these rights are guaranteed only in the event that subsequent legislation does not take them away. The final proposed document on rights and freedoms from the second sub-committee did not include such a limitation and it appears to have been added during the process of integrating the texts. Article 11 reads, "Every individual has the right to express an opinion through any means guaranteed by law provided it does not violate public order and morals. And the state guarantees: A. Freedom of press and printing and advertising and assembly and peaceful demonstration. B. Founding and joining associations and political parties and professional syndicates and unions." Similarly, Article 12 reads, "Freedom of religion and belief and the practice of religious rites are guaranteed in accordance with the law provided it does not violate public order and morals." Making freedoms dependent on "public morals" opens the door to legislative and judicial restrictions on rights.

-- POTENTIAL FOR EX POST FACTO LAWS: Article 14 (I) appears to permit ex post facto criminal laws. The provision states, "Criminal laws shall not have a

retroactive effect unless the law stipulates otherwise."

-- BAN ON MILITIAS OR SECRET ORGANIZATIONS: Article 16 B will reassure some Sunni Arabs with a clear ban on militia activity even as victims of the former regime look to it as a bulwark against the Ba'ath, which arose as a secret movement. It reads, "The establishment, secretly or openly, of civil institutions that have an antagonistic character, or that damage the society, or that have a military character, or of an armed militia, is forbidden."

-- USING ISLAM TO BOUND INTERNATIONAL TREATY OBLIGATIONS: Article 17 of this section puts a Islamic condition on all Iraqi treaty obligations that throws its commitment to international obligations into question. It reads, "In addition to all the rights mentioned in this constitution, an Iraqi enjoys all rights stipulated in international treaties that Iraq is a party to insofar as they do not contradict with the principles of Islam." This qualification is particularly worrisome when one considers that some radical Islamists argue that the Sharia specifically supports weapons of mass destruction and terrorism.

-- LIMITING STATE WELFARE OBLIGATIONS: This draft text takes a step back from earlier drafts that risked putting significant welfare obligations on the government. Under Article 19, state resources limit state obligations as follows, "All Iraqis have the right to education and health care and social security and the availability of work opportunities and the state must guarantee this within the limits of its resources." A provision in a preliminary draft that would have obligated the state to pay pensions and unemployment insurance was dropped entirely.

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Part III: Institutions  
of the Federal Government  
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15. (C) The third chapter of the constitution outlines the structure of government while introducing a number of small but potentially significant changes to the system. Echoing the TAL, it provides for three branches of government and the separation of powers. While the chapter is relatively complete, the text contains some internally inconsistent discussion on relations between the three branches (including appointment of Higher Juridical Council members). Later drafts presumably will rectify this.

16. (C) LEGISLATIVE AUTHORITIES: The draft document calls for a bicameral legislature consisting of a National Assembly and a "Council of Provinces and Governorates." The text that follows, however, only describes the authorities of the National Assembly, leaving doubts about even the existence of the "Council of Provinces and Governorates." The draft also does not address the issue of Iraq's electoral law or the shape of the next elections, a matter that some have argued is not constitutional in nature.

-- SEAT DISTRIBUTION OFFERS NO PROVISION FOR WOMEN: This text establishes a ratio of one representative for every 100,000 people, and a side-note indicates they expect to arrive at 275 seats. The text notes a recommendation that 5 extra seats be set aside for minorities and filled by the provinces and governorates. The text contains no provision ensuring one-quarter representation for women as found in TAL Article 30 (C).

-- MEMBERSHIP REQUIREMENTS KEEP HALF-IRAQI'S AND SOLDIERS OUT: The Assembly membership requirements stipulate that all members must be born of two Iraqi parents, a provision that may assuage fears by Sunni Arabs that some representatives will have dual loyalties. The text adheres to the requirements laid out in the TAL with a few interesting additions that broaden the ban on former regime figures. It states, similar to the TAL, that candidates may not be "covered by de-Ba'athification law" or have been members of the former "apparatus of oppression." It adds, however, nominees must also "not be a member of the armed forces or security services at the time of nomination." These standards also apply to the prime minister.

-- SIMPLE AND ABSOLUTE MAJORITIES FOR MOST KEY DECISIONS: The draft sets a four-year election cycle and two 6-month sessions for the assembly per year. Quorum is set at an absolute majority of members, a step that could favor a future successful Shia

alliance. A simple majority, unless specified otherwise, would be required for all decisions. The draft text shows an ongoing debate over whether the assembly would elect the president and vice presidents by absolute majority or two-thirds majority. The National Assembly would confirm the prime minister and cabinet by absolute majority. The document continues, as per the TAL, to allow the assembly to ratify treaties by a simple majority vote. The draft also maintains the call for an absolute majority vote in the confirmation of the prime minister and his cabinet.

-- A PIVOTAL DEBATE OVER ELECTING THE PRESIDENT: The draft text shows an ongoing debate over whether the assembly would elect the president and vice president by absolute majority or two-thirds majority. The National Assembly, according to this Shia-proposed text, would also have the ability to confirm the prime minister and cabinet by absolute majority. Choosing the president by absolute majority would significantly diminish the need for future Iraqi governments to be based on broad coalitions spanning across ethnic/religious groups. A majority in parliament (The TAL calls for this to be a two-thirds vote, and that steep requirement forced the Shia list and Kurdish alliance to ally after the elections.)

-- STRONG CONTROL OF ARMED FORCES: The Assembly must authorize the deployment of Iraqi armed forces abroad by a two-thirds vote. An absolute majority, however, can approve the deployment of the Iraqi armed forces for a UN mission. The assembly must approve a declaration of war or announcement of a state of emergency by a two-thirds vote. The latter is limited to one-month periods, subject to renewal.

-- POTENTIAL TO MICROMANAGE GOVERNMENT ECONOMIC POLICY: Article 22 appears to give the National Assembly significant authority to micromanage the economic development work of the government within approved budgetary outlays by granting it the right to "consider" any project or loan concluded by the Iraqi government that would require expenditure of Iraqi funds. (Comment: given the enormous abuses of Iraqi oil wealth in the Saddam regime, such a limitation is understandable but problematic. End Comment.)

-- EXTENSIVE SECURITY AND JUDICIAL CONFIRMATION POWERS: The assembly must approve a wide range of appointments by the prime minister, including the chiefs of staff of the armed forces, director of the intelligence service and members of the national security council. Acting by absolute majority, the assembly would also have to confirm the council of ministers' appointments to the Higher Juridical Council. A two-thirds majority would be required to approve judicial appointments by the prime minister to the Constitutional Court. The assembly would also be required to approve the Higher Juridical Council's nominees for the justices of the court of cassation and for general prosecutor.

-- AN ARRAY OF NO CONFIDENCE VOTES: The assembly would be able to withdraw confidence in the prime minister by an absolute majority provided such a vote is called by either one-fifth of the members; the president, and then only under "justified essential reasons"; or in the event that the prime minister has been convicted by the Supreme Court (presumably of criminal offense, though the supreme court is not a criminal court). The National Assembly would have the right to withdraw confidence in individual ministers by absolute majority in the event of an "absence of capability or integrity." (A separate, apparently contradictory article calls for a two-thirds majority on such no confidence votes.) The assembly may dissolve itself by a two-thirds vote, which would force elections within three months.

-- STANDARDS FOR SUCCESSION: If the president steps down, his deputy replaces him and the assembly must elect a new president within one month, according to the draft. If the Council of Ministers receives a no-confidence vote, they may finish out their term for one month. If the prime minister steps down, the deputy prime minister replaces him or her for at most one month.

Khalilzad